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THE ARMY COMMUNICATOR AND MASS COMMUNICATION LAW: AN ANALYSIS OF ORGANIZATIONAL AND PERSONAL LI. ILITY

by

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This thesis analyzes mass communication law from the perspective of the Army communicator. It presents long established principles on which to base recent cases. It discusses the impact of critical legal decisions. Additionally, it discusses the implications of communication law for the Army public affairs officer. The focus is on legal and technical libability of the organization and the individual communicator. The author also discusses the reputation of the organization and the individual. The thesis treats the danger the military risks in the court of public opinion and perception.

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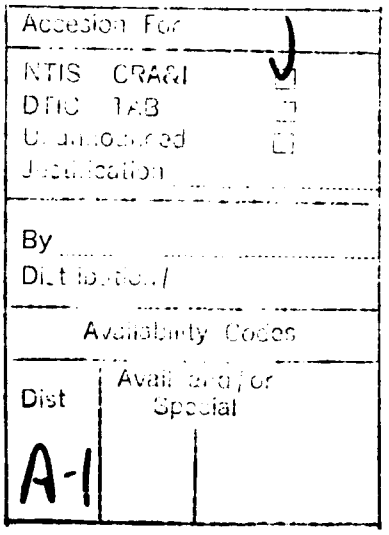

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CHAPTER I

INTRODUCTION

The United States Army, and the rest of the Armed Forces, increasingly is concerned with presenting an accurate self-portrait. Alleged military contract cost overruns, "women in the military" studies, the Bradley Fighting Vehicle, the Grenada intervention (and subsequent press access to military operations), Army readiness, recruitment practices, military pay inequities, and countless other Army-related issues are found in today's media headlines and lead stories. Communicating the resolution of these issues to internal and external audiences will help portray the Army as a professional and concerned organization.

At the core of this effort is the Army communicator. In many instances, the commander is the communicator and spokesperson for his or her unit. Typically, however, the public affairs officer (PAO) acts as the official spokesperson for the commander and the command.[1]

The mission of the United States Army is to fight and win wars. Few would argue, however, that deterring those wars is certainly preferable to fighting them. At the core of U.S. military policy since World War II has been the belief that a high state of combat readiness will deter potential adversaries from engaging the U.S. in armed conflict.[2]

A high state of readiness is useless as a deterrent if no one is aware of it. Von Clausewitz described a successful war effort as a trinity of the people, the army, and the government.[3] Communication -- informing the people about the army and the government -- connects the trinity. Here again, the PAO is at the core. While PAO's cannot engage in "persuasive activities,"[4] they can work to "inform" both internal and external audiences of Army issues and developments.

Recognizing this need to communicate, the Army has established a sizable information network. Installations routinely have their own newspapers. Some have television and radio stations. Additionally, there are periodicals of all types published by the Army at multiple levels.

Specifically, the Army's Office of the Chief of Public Affairs lists the following in its internal communication network as of January, 1988:

-58 Weekly Newspapers

-45 Bi-Weekly Newspapers

-88 Monthly Newspapers

-40 Bi-Monthly/Quarterly Newspapers

-41 Closed-Circuit TV Stations

-14 Overseas TV Stations

-28 Overseas Radio Stations

-Speakers Bureau for military and civilian audiences

-Monthly edition of Soldiers Magazine

This enormous network is designed to reach an internal audience of enlisted soldiers, officers, dependents, members

of the National Guard and Reserve, Department of the Army civilians, cadets and retirees. The total internal reach is nearly 4,000,000.[5] Additionally, Army communication reaches large external audiences.

In a sense, PAO's occupy positions similar to civilian newspaper editors, broadcast news directors, or other mass communication practitioners. The PAO is responsible for the content of communication, and faces many of the same dangers as civilian counterparts from mistakes or misuse of these communication outlets.

The dangers lie in the explosion of communication related law suits. The fallout from that explosion comes from juries who are not sympathetic to those who defame, invade privacy, violate copyright, or otherwise infringe upon the rights of the individual.

While the rights of individuals in the military community may not always parallel the rights of those in the general public, the military communicator must beware of injuring a member of the audience or unjustly infringing upon constitutional rights.

This thesis analyzes mass communication law from the perspective of the Army communicator. It presents long-established principles on which to base recent cases. It discusses the impact of critical legal decisions. Additionally, it discusses the implications of communication law for the Army public affairs officer.

The focus is on legal and technical liability of the

organization and the individual communicator. The author also discusses the reputation of the organization and the individual. While defenses may exist in a court of law, there may be no remedy in a court of public opinion. This may be the real danger for a military accutely concerned with public perception.

Topic Background and Search Strategy

The idea that Army communicators may be liable for damages sprang from questions asked of the author in a mass communication law seminar. Unable to answer the questions, the author began to query Army public affairs and legal communities. Initial findings seemed to indicate that little material was available concerning the extent of personal and organizational liability facing Army communicators, case precedent, and degree of similarity with civilian communicators.

Most of the Army personnel interviewed initially shared the author's interest and concern about the topic, and offered research suggestions.

Computer assisted and manual literature reviews were completed. Key words used for the searches came from interviews with military personnel and from mass communication law textbooks. While these reviews were helpful, specific information still seemed surprisingly scarce.

Telephonic contact was made with the Defense Information School to obtain current material being presented to students projected to serve in the military public affairs community.

"The Public Affairs Officer and the Law," a chapter from the PA Handbook, was obtained.

After reviewing available material, the author personally interviewed key leaders in the Army Office of the Chief of Public Affairs, as well as Army attorneys.

The thesis resulted from this information and input from the tort branch of the Department of Justice.

CHAPTER NOTES

[1]"Public Affairs," Field Manual 46-1, Washington, DC: Headquarters, Department of the Army, April 1986, p. 10.

[2]Ibid., p. 8.

[3]Harry G. Summers, "Western Media and Recent Wars," Military Review 66 (May 1986): 5.

[4]Field Manual 46-1, p. 11.

[5]Interview with COL M. J. Lundberg, Chief, Command Information Division, Office of the Chief of Public Affairs, U.S. Army, Washington, DC, 26 January 1988.

CHAPTER II

MILITARY PERSONNEL AND FREEDOM OF SPEECH

The First Amendment to the U.S. Constitution states, "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."[6]

On initial examination, it would seem the Founding Fathers were clear and unambiguous. There would be "no law" interfering with freedom of speech and press. Starting with the Alien and Sedition Acts of 1798, however, there has been little that is clear or unambiguous in the words of the First Amendment. The government has passed laws which restrict speech and the courts have upheld those laws.

Military personnel, sworn to protect and defend the Constitution, are subject to a number of regulations restricting speech.

Background on Government Regulation of Speech

The first case often discussed in an examination of governmental regulations of speech is the 1919 U.S. Supreme Court decision in Schenck v. United States (See Appendix A). Mr. Schenck was a German immigrant and secretary of the communist party in the United States. He was convicted of violating espionage and postal laws by printing and circulating pamphlets calling for draftees to avoid military service.

In upholding Schenck's conviction, the Court held words "of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent" can, in fact, be restricted.[7]

The idea that government can regulat speech in certain areas involving a "clear and present danger" continued to grow and expand over time. The 1927 holding in Whitney v. California (See Appendix A) found speech could be restricted if there was "reasonable ground to fear that serious evil will result if free speech is practiced."[8]

In 1951, in Dennis v. United States (See Appendix A), the Court further expanded those words thought to present a "clear and present danger."[9] The mere advocacy of governmental overthrow, said the Dennis Court, was grounds for governmental restraint.

The current interpretation of "clear and present danger" comes from the Court's holding in the 1969 Brandenburg v. Ohio decision (See Appendix A).[10] A Ku Klux Klan leader was convicted of violating the Ohio Criminal Syndicalism statutes which bar advocating, or assembling with those who advocate, violent government overthrow. The Supreme Court, in reversing the conviction, abandoned the holdings of Whitney and Dennis and returned to a very strict view of speech presenting a "clear and present danger." Such speech must now present "imminent lawless action."

Clearly, while the degree of regulation varies, the government constitutionally can regulate normally protected

speech -- at least when speech presents a danger of imminent lawless action.

Schenck and its progeny dealt with punishment after speech. Other Court decisions have held the government can also impose prior restraint on speech. Often cited in discussions of prior restraint is the 1931 decision in Near v. Minnesota (See Appendix A).[11]

Mr. Near published a newspaper in Minnesota. His paper, The Saturday Press, ran afoul of Minnesota statutes prohibiting "malicious, scandalous, and defamatory" papers. Near was convicted of violating the statute and forbidden from publishing that paper in the future. The Minnesota State Supreme Court upheld the conviction.

The Supreme Court reversed, holding the conviction violated the First Amendment prohibition on prior restraint. But, in what has become critical language, the Court said, "Liberty of speech and of the press is not an absolute right. . . ." The Court went on to find four areas that are exceptions to the First Amendment prohibition against prior restraint. These are: speech involving matters of national security; obscenity; clear and present danger; and areas of individual's private rights (such as defamation, privacy, copyright).

In a 1971 case involving the New York Times v. United States (See Appendix A), the Court again addressed prior restraint. This so-called "Pentagon Papers Case" is often cited as a clear victory for the press. When analyzed care-

fully, however, the holding was simply that the government "carries a heavy burden of showing justification for the enforcement of such a restraint." In this case, the government did not meet the burden.[12]

Military Restrictions on Speech

The military imposes restraints on speech in a number of ways. Army regulations, which carry the force of law, require an administrative review of certain materials authored by service members before they can be distributed.[13] Command approval is required before a service member may circulate a petition to Congress.[14] Article 88 of the Uniform Code of Military Justice makes it a court-martial offense for any commissioned officer to use "contemptuous words against the President, the Vice President, Congress, the Secretary of Defense, the Secretary of a military department, the Secretary of Transportation, or the Governor or Legislature of the state in which he is on duty or present."[15] Finally, commanders can prohibit publication and on-post release of information deemed "a clear danger to loyalty, discipline or morals."[16]

Justifications for these restraints on soldier's speech usually fall into one of three categories. They are: the need to protect government interests; the need to protect secrecy in military operations; and the need to maintain discipline and readiness in a military society held to be different from its civilian counterpart.[17]

These efforts to regulate speech, and the justifications mentioned above, have been upheld by military courts and the

Supreme Court.

In the 1967 case of United States v. Howe (See Appendix A), Army Lieutenant Howe participated in an anti-war rally while off post, on leave from the Army, and in civilian clothes. He expressed his beliefs by carrying a placard expressing his opposition to President Lyndon Johnson's role in the Vietnam conflict. Howe was arrested and convicted under Article 88 of the Uniform Code of Military Justice. The conviction was upheld by the Court of Military Appeals.[18]

A second case often cited in the discussion of freedom of speech in the military is Parker v. Levy (See Appendix A). This 1974 Supreme Court decision upheld Army Captain Levy's conviction for making public statements that urged black soldiers not to go to Vietnam.[19]

A more recent decision involved Air Force Captain Albert Glines of Travis Air Force Base, California (See Appendix A). Captain Glines objected to the grooming standards of the military. He drafted a petition to collect the names of those who agreed with him. Knowing that circulating such a petition on the installation without the permission of the base commander was in violation of existing regulations, Captain Glines circulated his petition off-post. The petition found its way into the hands of an Air Force sergeant and circulated on-post. Glines was convicted and subsequently removed from active duty.

Captain Glines sued, claiming his removal from active duty violated his First Amendment rights to free speech and his right to petition Congress.[20] Glines won his suit at the

district and appellate level. The military appealed to the Supreme Court.

In 1980, citing the "separate society" justification, the Court overturned the decision. Justice Powell, writing for the majority, opined, "The military is, by necessity, a specialized society separate from civilian society."

Many legal scholars agree the Glines case "makes clear that, where there is the slightest doubt, the courts will view the military interest in preparedness as supreme."[21]

Speech and other forms of communication and expression by a military member can be regulated. Political expression, petitions, and other material uttered or authored by those in the military, are subject to restraints not placed on similar material prepared by civilians.

CHAPTER NOTES

[6]Donald M. Gillmor and Jerome A. Barron, Mass Communication Law (St. Paul, MN: West Publishing Company, 1984), p. 1.

[7]Ibid., p. 11.

[8]Ibid., p. 24.

[9]Ibid., p. 66.

[10]Ibid., p. 74.

[11]Ibid., p. 96.

[12]Ibid., p. 106.

[13]"Public Information," Army Regulation 360-5 (Washington, DC: Headquarters, Department of the Army, 1986), p. 13.

[14]"Prior Restraints in the Military," Columbia Law Review 73 #5 (May 1973): 1090.

[15]Richard W. Aldrich, "Article 88 of the Uniform Code of Military Justice: A Military Muzzle or Just a Restraint on Military Muscle?" UCLA Law Review 33 (1986): 1191.

[16]"Prior Restraints in the Military," p. 1093.

[17]Ibid., p. 1092.

[18]Aldrich, p. 1199.

[19]Ibid., p. 1214.

[20]Erik Strangeways, "Freedom of Expression in the Military: Brown v. Glines," New York Law School Law Review 26 #4 (1981): 1136.

[21]Andrew S. Dash, "Brown v. Glines: Bowing to the Shibboleth of Military Necessity," Brooklyn Law Review 47 #1 (Fall 1980): 282.

CHAPTER III

ACCESS TO MILITARY INFORMATION, OPERATIONS, AND INSTALLATIONS

The military and the media maintain an antagonistic relationship. There are many causes for this less-than-cordial acquaintance and many suggestions for improvement.

One area that has historically aggravated the relationship is denial of press access. Laws, court decisions, regulations, and commissions have been drawn into the argument between the two institutions whether the public and the media have a right of access to military information, operations and installations.

Army public affairs officers may find themselves in the middle of the argument. For example, the Defense Information School proposes "Maximum disclosure with minimum delay." The media often seem to demand total disclosure with no delay.

Access to Information

The idea that members of the public and the press should have access to government information became law in 1967 when Congress passed the Freedom of Information Act. The underlying premise of the Act is that public records should be open to public inspection. After 1967, the government could no longer "withhold information on the arbitrary ground that its release would be contrary to the public interest."[22]

A Secretary of Defense memorandum of December 1, 1983, emphasizes the Freedom of Information Act. In part that memorandum reads, "Information will only be withheld when disclosure would adversely affect national security or threaten the safety or privacy of the men and women of the Armed Forces."[23]

The military public affairs community is charged with carrying out this commitment to the public. To further clarify Army policy, the Army Office of the Chief of Public Affairs published Regulation 360-5 providing clear and comprehensive guidance to PAO's regarding release of, and access to, information. Access to operations, however, is not as clear cut.

Access to Operations

On October 25, 1983, the United States committed troops to combat for the first time since Vietnam. Press relations with the military at the time were probably better than at any time since World War II. The press had "gotten over its post-Vietnam disenchantment with the Pentagon."[24] The hostage situation in Teheran and the disastrous rescue attempt, coupled with perceived Soviet power in Afganistan, led to public perception of a weak U.S. military. The military added to that perception with accounts of superior Soviet arms buildup and an imbalance of power between the superpowers. These alarms led many in the media to actually join the fight for higher military spending. Time magazine wrote of the "fiercely hawkish mood in the winter of 1980 from Congress to

the newsrooms."[25]

But the actions of late October, 1983, were to change that. Perhaps a military public affairs officer summed up the change best when he said, "We have done more to hurt the military in the last few hours than any enemy in the last 200 years."[26]

The military, backed by the Secretary of Defense[27] (and subsequently the American people[28]) denied press access to the Grenada intervention for some 48 hours. More, it prevented those journalists already on the island from reporting the invasion.[29]

To understand the constitutional and legal considerations of the press ban imposed by the military in Grenada, it is first necessary to understand the court and case history surrounding the concept of press access to places, as opposed to access to information.

An example of the Supreme Court's efforts to wrestle with the concept of press access to places is the 1977 case of Houchins v. KQED (See Appendix A). This case involved an assertion by the press that it had a right of access to a prison. While a portion of the Court did see a "public's right to know" about the conditions inside the prison and opined that some kind of access should be available to the press, the majority opinion held, "This Court has never intimated a First Amendment guarantee of a right of access to all sources of information within government control."[30]

The Houchins Court found no constitutional right of

press access to prisons. Such rights have begun to emerge, however, for press access to courtrooms. It is possible that the inroads made by the press to gain access to courtrooms might be extended to military operations.

Access to courtroom cases began in 1976 with the landmark decision in Nebraska Press Association v. Stuart (See Appendix A). The Court held a judicially-issued prior restraint of the press in a pretrial situation could be found valid if a three prong test could be met.[31] The judge must have evidence there has been, and will continue to be, prejudicial pretrial coverage. There must be evidence the restraint will be effective. Other available measures to control prejudicial coverage, including closing the courtroom, must have been discounted for good reason.

After Nebraska Press Association, valid prior restraints on the press, so-called "gag orders," are difficult to obtain and uphold. Accordingly, judges began to turn to other remedies to control prejudicial pretrial and courtroom publicity, specifically denial of access to the courtroom.

The case of Gannett v. DePasquale in 1979 (See Appendix A)[32] involved the closure of a pretrial hearing in a case of three New York fishermen charged with murder. The judge closed an evidence suppression hearing after agreement from the prosecution and the defense and after no objection from the Gannett reporter present. The Supreme Court held the press and the public had no Sixth Amendment right to attend a pretrial hearing.[33]

In 1980 the Court finally found a constitutional right of press access to a particular place. This case, Richmond Newspapers, Inc. v. Virginia (See Appendix A), is often mentioned by those who would find a right of press access to military operations.

In 1976, a man named Stevenson was charged with the murder of a hotel manager. He was tried and convicted in the Virginia courts, only to be freed after the State Supreme Court found evidence had been improperly admitted into trial. A second and third trial for Stevenson ended in mistrial.

During the fourth trial the judge closed the courtroom, at the request of the defense, and over no objection from the prosecution or the reporters from Richmond Newspapers.[34] This closure was addressed by the Supreme Court.

The Court found the "right of access to places traditionally open to the public, as criminal trials have long been, may be seen as assured by the . . . First Amendment guarantees of speech and press." Further, the Court found the presence of the public and the media has been "thought to enhance the integrity and quality of what takes place."[35]

While it seems the Court found a constitutional right of press access to a criminal courtroom situation, the Richmond decision is still a narrow one. It does not guarantee a general First Amendment right to gather news. "Lawyers and courts have interpreted Richmond Newspapers as granting only a qualified news-gathering right. . . ."[36]

In more recent cases involving press access to court-

rooms, the Court has expanded a First Amendment-based right of access for the media to be present during the jury selection process, and to some extent, for the preliminary hearing (See Appendix A).[37]

The Court, in deciding the Richmond case, carefully traced the "right of access to places traditionally open to the public." The first question for finding a right of access to military operations then becomes: Have military operations been places traditionally open to the media and the public?

The decision to exclude the press from the initial phase of the Grenada operation was not precedent-setting. Instances of such exclusion can be found in the Civil War and in General Pershing's operations in the Philippines.[38] On balance, however, the press has historically followed soldiers into combat. That question, therefore, would seem to be satisfied.

The second question in attempting to determine if the media right of access to courtrooms found in Richmond Newspapers should extend to military operations is whether the media presence enhances the "integrity and quality of what takes place."[39]

In applying this question to a Grenada-like situation, one must determine if the media would have added to the "integrity and quality" of the operation. It is questionable that a reporter on the front lines of a fight could add significantly to the quality of the operation or the quality of the reports to the homefront. The front line is often the worst of all possible vantage points from which to observe

the ebb and flow of a battle. On the other hand, reporters at other locations on the battlefield might well add to the public's understanding of the operation, thereby adding to the integrity and quality of the operation.

If it is possible to fashion a two-prong test for a constitutional right of access from the Richmond decision and its progeny, the prongs would seem to be 1) is there a historical and traditionally accepted right for the public -- and therefore the press -- to be present, and; 2) does that presence enhance the quality and integrity of what takes place?[40]

The test was not met in a prison setting, it was in a courtroom setting. There is no clear answer for the overt military operation, but it would seem the military operation comes closer to the courtroom situation than to the prison situation.

Access to Installations

The Army communicator normally operates within the confines of a specific military installation. Courts have held the military has broad powers to regulate or deny access to installations.[41]

The ability to regulate, however, does not present a total defense for the PAO or commander who regulates access improperly.

"Firmly embedded in our concept of the free speech protections contained in the First Amendment is the notion that public property is a particularly appropriate place to . . . communicate thoughts and debate public issues."[42] This notion

of a "public forum," and the extent to which a piece of ground constitutes a public forum, becomes more difficult to settle when the piece of ground is a military installation. When a military installation is involved, two conflicting interests emerge: the right to freedom of speech; and national defense.

Courts have traditionally held the national defense to be of primary importance when balanced with the public's right to enter and express themselves on a military installation. Writing for the court in Greer v. Spock (See Appendix A), Justice Stewart observed that "it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise."[43]

In order to allow the Armed Forces to prepare for the onset of conflict, it has been accepted historically that civilians can be kept out of military installations. In a 1961 opinion in Cafeteria and Restaurant Workers v. McElroy (See Appendix A), the Supreme Court recognized "the historically unquestioned power of the commanding officer summarily to exclude civilians from the area of his command."[44]

The argument courts seem to rely upon is that a military installation is a training ground, and not much else. In the modern, all-volunteer Army, that is often not the case. In many ways, the casual observer might perceive the modern military facility as much like neighboring civilian communities. The military base routinely offers shopping centers, banking facilities, recreational facilities, housing areas, schools, libraries, churches, restaurants and other activities

that would seem familiar to any civilian visitor.

The modern-day military mission is also somewhat different than the one apparently envisioned by the court in the late 1950's. A primary mission is recruitment of qualified soldiers. The ability to attract and recruit these soldiers is largely dependent on the ability to present a positive image when a prospective soldier enters the military installation. The mission is accomplished by opening the installation to the public. These open installations present special difficulties for the commander and the PAO.

Today, the civilian public and press has greater access to military installations. With increased access comes a greater opportunity for the public to express its views while on a military base. The problem for the Army communicator is helping the commander determine what speech can be allowed on the post, and when and where it can occur. Court decisions have differed with jurisdiction, and added to the confusion.

In 1972, the Court dealt directly with civilian freedom of speech on military installations.[45] Flower v. United States (See Appendix A) involved an individual who, even after being barred from Fort Sam Houston, Texas, insisted on handing out leaflets on the post. Flower was convicted of federal trespass statutes for handing out anti-war leaflets on New Braunfels Avenue, a major public highway running through the post.[46] The Supreme Court dismissed Flower's conviction, relying largely on the notion that the Fort Sam Houston avenue was a public place. The court held "the fort commander

chose not to exclude the public from the street where petitioner was arrested. Under such circumstances the military has abandoned any claim that it has special interests in who walks, talks or distributes leaflets on the avenue. The base commander can no more order petitioner off this public street because he was distributing leaflets than could the city police order any leafleteer off any public street."[47] After Flower, the test for freedom of speech on a military installation seemed to be: is the area where the speech takes place open to the public? If so, the commander had little more power to limit speech than his civilian counterpart in the local mayor's office.

The next landmark case in the debate over military installations as public and open forums was Greer v. Spock, decided in 1976 (See Appendix A). During the 1972 presidential campaign, Doctor Benjamin Spock and several others petitioned the Commander of the Fort Dix, New Jersey, military base for permission to come onto the installation and distribute literature and conduct a political rally.[48] The commander, citing the training mission of the post, denied the request. Spock sought relief from the Third Circuit and was granted permission, based on Flower, to appear on the base.

The Supreme Court, in 1976, held that despite Fort Dix's openness, it was not generally a public forum and the commander could lawfully deny entry to political candidates.[49] The Court distinguished Greer from Flower by recognizing Flower involved speech on a highway that had been open to the public.

The Court seemed to narrow an "open to the public" argument by adopting a test which examined the tradition of openness which existed for First Amendment purposes. Upon such examination, a military post did not meet the requirement of being a place historically and traditionally associated with First Amendment activities.[50]

In Persons for Free Speech at SAC v. United States Air Force (See Appendix A), a group calling itself Persons for Free Speech asked to participate in an open house being held on Offutt Air Force Base in Nebraska. Offutt AFB houses the headquarters of the Strategic Air Command. Offutt is a closed base, but selected non-military groups were, on occasion, invited to distribute literature. Past groups to do so include defense contractors, local civic groups and safety organizations.[51] This particular open house was to be the latest in an annual series and the general public was invited to attend.[52]

Persons for Free Speech requested permission to present literature calling for "an alternative to the . . . dangerous and costly arms race."[53] The request was denied by the commander of Offutt AFB. He said the proposed activity was inconsistent with the purpose of the open house. The commander's decision was upheld by the district court, and was affirmed on appeal to the Eighth Circuit Court.[54] The Supreme Court denied certiorari.

The Eighth Circuit held, "The question is whether the open house is such a deviation from the historical and tradi-

tional uses of Offutt so as to create a public forum. We hold it does not."[55]

The court also addressed an argument involving equal protection. Persons for Free Speech raised the issue of the military allowing some civilian groups to come onto the base to participate in the open house while denying others the same opportunity.[56] The majority of the court held the contractors were an integral part of the military mission. Additionally, the court sided with Offutt's commander that maintenance of order and protection for the anti-war group would have been difficult had they been granted permission to participate.[57] The court seemed to say the Air Force could limit groups participating in the open house to those whose activities were consistent with the purpose of the event.

A recent major case involving free speech on a military installation is United States v. Albertini (See Appendix A) James Albertini's conviction of federal trespass statutes was overturned by the Ninth Circuit which held that the open house at Hickam Air Force Base, Hawaii, did turn the base into a public forum.[58]

The fact pattern in Albertini is much the same as in SAC. Hickam AFB held an annual open house in 1981. Normally a closed post, Hickam was open to the public for the day and spectators were encouraged to come on the installation and observe military demonstrations and displays. Albertini and several friends took the opportunity to protest the arms race. The group took pictures, passed out literature and held

banners.[59]

Albertini, who had previously received two bar letters from the post for defacing government property, was arrested and convicted of violating trespass statutes. It was this conviction the circuit court overturned. The court saw a "limited public forum" on the base, and held that Albertini's conviction was a violation of constitutionally protected actions.

In June, 1985, the Supreme Court overturned the decision of the Ninth Circuit. Justice O'Connor, writing for the majority, opined there is no generalized constitutional right to make political speeches or distribute leaflets on military bases even if they are generally open to the public. The Court felt the Ninth Circuit relied too heavily on the Flower decision. Flower, they said, only applies to certain areas on installations in which the military has abandoned control. The Supreme Court saw no public forum even when open houses are held.[60] (For more on public forums as they relate to Commercial Enterprise newspapers, see Chapter VI.)

CHAPTER NOTES

[22]Gillmor, p. 439.

[23]Army Regulation 360-5, p. 25.

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CHAPTER IV

ORGANIZATIONAL AND PERSONAL LIABILITY FOR TORTS

Public affairs officers are government officials. As such, they become targets of an increasing trend of litigation. There are more than 2,800 suits currently pending against officials in the federal government. In the 15 year span between 1971 and 1986, more than 12,000 such suits were filed and litigated. Thirty-two of those suits resulted in verdicts against government officials.[61]

While government officials rarely will find themselves actually paying a damage judgment, the risk of suit is present and increasing. The act of giving rise to a suit, or being involved in litigation, is potentially damaging to the military's reputation. More importantly, the officials involved are distracted from their primary duties and readiness can ultimately suffer.

Aside from becoming involved in personal litigation, the PAO can give rise to suits in which the military is the defendant. These suits are equally damaging to the military's reputation.

A cornerstone of effective public relations, whether military or civilian, is the ability to manage issues before they become problems.[62] Public relations practitioners note professionals should concentrate on problem prevention, rather

than problem creation. One way to accomplish this in the current legal arena is to understand the nature of litigation in which PAO's may find themselves, available defenses, and the latest court decisions in the area.

This chapter focuses on defamation, invasion of privacy, and infliction of emotional distress, areas of tort law often associated with the professional communicator. Each area is reviewed to provide a background for the reader. Each is examined to determine personal and organizational liabilities. Finally, scenarios are posed showing how Army communicators may become involved in litigation.

Defamation

Defamation is communication which tends to injure someone's reputation. It is communication -- written, spoken, pictorial, gestural, or otherwise -- that causes people not to want to associate with another person.

Defamation is a tort whose history at common law dates back for centuries. It has always been considered a very serious issue. Those who defamed others were, at one time, held to a standard of liability only shared by those who transported explosives or kept wild animals. If the plaintiff could show he was defamed, the defendant was strictly liable regardless of how accidental the defamatory statement may have been.

Permanent and fixed defamatory communication, usually in the form of the written word, is called libel. Libel accounts for most defamation cases. PAO's could libel in post

newspapers, Army magazines, and even personnel efficiency reports (individual liability in such cases will be discussed later).

There are two types of libel.[63] The first is libel "per se," meaning the statement is defamatory "on its face." There are four types of statements that historically have been libelous per se: statements alleging incompetence in business; statements alleging unchaste behavior; statements alleging the presence of a serious disease. In cases involving libel per se, the plaintiff need only show the statement was made.

The second type of libel is "per quod," meaning a statement is defamatory "because of the circumstances." In libel per quod the plaintiff must introduce other evidence to show why the statement was defamatory.

Since 1964, the court history of libel has been a convoluted trail of holdings, clarifications of holdings, restatements of decisions, returns to previous decisions, and other twists that make the study of this area of communication law a challenging undertaking.

The 1964 case which changed defamation law was New York Times v. Sullivan (See Appendix A). This landmark Supreme Court decision divided libel plaintiffs into two categories: public officials and private citizens. Public officials, following the Sullivan holding, had to show not only that they were defamed, but that the defendant acted with "actual malice" defined as "knowledge of falsity" or "reckless dis-

regard for the truth."[64]

Two years later, the Court used the case of Rosenblatt v. Baer (See Appendix A) to define a "public official" as those who have, or appear to have, a significant decision-making ability.[65]

In 1968, the Court defined "reckless disregard" as entertaining serious doubt about the truth, but publishing anyway.[66]

In 1967, two cases combined to further cloud the issue of defamation. In Curtis Publishing Company v. Butts and Associated Press v. Walker (See Appendix A), the Court created a third category of plaintiff in a libel case: public figure. Requirements for plaintiffs in this category to win a libel suit are identical to public officials.[67]

In 1971, the Court completely turned away from a concern over the plaintiff's status. In Rosenbloom v. Metromedia (See Appendix A), it adopted an issue-oriented approach. After Rosenbloom, the concern was not who the plaintiff was, but what the issue is. If the issue is a public concern, any plaintiff must show actual malice.[68]

Finally, in 1974, the Court handed down what is still current libel law.[69] In Gertz v. Robert Welch, Inc. (See Appendix A), the Court first noted that "opinions" are absolutely protected from libel suits. The Court, rejecting its Rosenbloom logic, returned to a plaintiff rather than issue-centered approach to determine who needs to show actual malice in a libel suit. The Court identified three categories of

public figures: all-purpose; limited; and involuntary. Plaintiffs who fall into any of these categories must show actual malice. Rather than return to common law strict liability, however, the court held that a private citizen who brings a libel suit need only show the defendant acted with some negligence.

Organizational Liability for Libel

The authority under which the government can normally be sued by individuals who perceive they have been harmed is the Federal Tort Claims Act (FTCA) [28 U.S.C. 1346 (b)]. Enacted in 1946, this act provides "the U.S. shall be liable in the same manner and to the same extent as a private individual under like circumstances."[70]

There are, however, 11 torts expressly excluded from the Federal Tort Claims Act (note that a tort is defined as "a civil wrong or injury, other than a breech of contract, for which the court will provide a remedy in the form of an action for damages"[71]). Of critical concern to Army communicators is that claims arising out of alleged libel are excluded. The government cannot be successfully sued under the FTCA for alleged defamatory statements.[72]

Regardless of whether a successful court case arises, however, the PAO who libels someone may suffer in the court of public opinion.

Personal Liability for Libel

While it seems clear the government (Army) cannot be

held liable for defamatory statements made by one of its employees, the issue of the personal liability of that employee is more complex. "This type of litigation has become a favorite weapon of those attempting to chill, intimidate or seek retribution for some federal decision or activity."[73]

According to U.S. Department of Justice officials, "Personal tort suits have been filed against military service members at all levels and for almost any activity likely to engender controversy or ill-feelings. Suits have been filed over . . . defamation and slander. . . . Regardless of rank of activity, a commander or a service member could easily be the subject of a lawsuit."[74]

A number of factors affect military members sued personally for actions taken in their official capacity. Among them are: the status of the plaintiff; the type of claim (common law or constitutional tort); the particular duties performed by the defendant, and in some cases the status of the defendant.

The easiest type of suit to dispose of involves a military member sued by another military member. In this situation the PAO has little to fear from the courts.

"Intramilitary tort" suits are not a new phenomena. Prior to World War II, such suits were brought and money damages awarded.[75] But for the last 40 years courts have held that military members are not allowed to bring suit against other military members.[76]

This "absolute immunity" from suit is found in the 1950

Supreme Court decision that has become known as the "Feres Doctrine" (See Appendix A).[77] This doctrine sprang from three suits brought against the U.S. government. One suit involved an allegation of Army negligence brought by the widow of a soldier killed in a barracks fire. The other two suits involved military medical malpractice allegations. The Court held, "The government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service. We know of no American law which ever has permitted a soldier to recover for negligence against either his superior officers or the government he is serving."[78]

The Feres Doctrine covers situations involving suits brought by servicemen against the United States, or against other servicemen, or against civilian employees of the government. It also precludes derivative lawsuits brought by dependents of a harmed military member.[79]

If the plaintiff is a civilian, the defenses available and the degree of "immunity" applicable to a military defendant become less clear.

Common law torts, including libel, are based in the common law. Since 1959, government officials "who act within the outer perimeter of their federal duties are generally absolutely immune from state common law torts."[80] Taken from the landmark Supreme Court case of Barr v. Matteo (See Appendix A), this shield has not been consistently applied by courts and, if it ever provided an absolute shield, the recent deci-

sion in Westfall v. Erwin certainly chips considerably at the effectiveness of that shield.[81]

Barr v. Matteo involved a defamation suit arising from disciplinary action taken (and subsequent press release issued) by the civilian head of a federal agency. Respondent charged "that the press release, ... defamed them to their injury, and alleged that its publication and terms had been actuated by malice on the part of petitioner."[82] Finding for the government, the Court held, "It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties -- suits which would consume time and energies otherwise devoted to government service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administrative of policies of government."[83] Thus, since Barr, the courts have held "the utterance of a federal official to be absolutely privileged if made 'within the outer perimeter' of his duties."[84]

Another 1959 case, that of Howard v. Lyons (See Appendix A), has a more direct connection to the military official. In that case, a civilian employee of a Navy installation brought a libel suit against the commander for alleged harm which resulted from a memorandum the commander prepared and forwarded to superior officials. The Court, citing Barr, held the commander was absolutely immune.[85]

Since Barr, two conditions must be met in order for the official to enjoy absolute immunity from a common law tort

suit. First, the act which gave rise to the injury must have been within the scope of the official's federal duties. "Scope of duties" has been broadly defined as "bearing some reasonable relation to and connection with . . . duties and responsibilities."[86]

The second condition which must be met for an official to enjoy absolute immunity from common law tort suit is that the act which gave rise to the injury must have resulted from the exercise of some discretion on the part of the official. A discretionary act if one "wherein there is no hard and fast rule as to course of conduct that one must or must not take and, if there is a clearly defined rule, such would eliminate discretion."[87]

To understand this "discretionary" requirement, it is necessary to review the purpose of official immunity. This shield for government officials "is not to protect an erring official, but to insulate the decision-making process from the harrassment of prospective litigation. The provision of immunity rests on the view that the threat of liability will make federal officials unduly timid in carrying out their official duties, and that effective Government will be promoted if officials are freed of the costs of vexatious and often frivolous damages suits."[88] The purpose of the immunity is not to protect the person, but rather to protect the decision-making process.

The most recent court decision discussing this discretionary prong of the test for immunity is Westfall v. Erwin

(See Appendix A). Erwin was a civilian employee of the federal government. He worked as a warehouseman at the Anniston Army Depot in Anniston, Alabama. Erwin claimed he was injured as a result of contact with toxic soda ash that was improperly and negligently stored at the depot. He further alleged that his supervisors, including Westfall, should not have sent the ash to the warehouse and should have warned him as to its presence and danger.

The U.S. District Court for Northern Alabama found for Westfall, noting that the alleged tort was committed while Westfall was acting in the scope of his official duties. It held Westfall absolutely immune from suit and granted summary judgement in his favor. The U.S. 11th Circuit Court reversed, holding that a federal employee is immune "only if the challenged conduct is a discretionary act AND is within the outer perimeter of the actor's line of duty."[89]

The Supreme Court, in a decision handed down in January, 1988, affirmed the appellate decision.[90]

While not precisely defining "the discretionary function," the Court rejected the government's argument that any conduct that "is not mandated by law" is therefore discretionary. That, said the Court, is too "wooden" an interpretation and would render the requirement meaningless.[91] The Court seemed to conclude that where there are established procedures and guidelines, there is no discretion involved. Without this discretion, there is no absolute immunity for the accused official.

The impact of Westfall v. Erwin is yet to be felt. Erwin's argument that Westfall's duties "only required [him] to follow established procedures and guidelines," and that he was "not involved in any policy-making work for the United States Government," prevailed.[92]

Westfall v. Erwin does not overrule Barr v. Matteo. "Barr is still good law."[93] But the concern by the Department of Defense and the Department of Justice is that the Westfall decision may give rise to increased litigation. At the least, Westfall lessens the chances for a summary judgement for the government. That alone is reason enough to be aware of the possibility that the once accepted absolute shield is now in question. This creates the possibility that military officials will be called into court for common law tort violations against civilian plaintiffs. This would take the official away from primary duties, hinder readiness, and cause the military to suffer in the eyes of the community.

Libel Implications for the PAO

The mission of the Army communicator is somewhat different from a civilian communicator. Army media outlets are less concerned with "sensationalism," "investigative reporting," and other activities that often involve the civilian media in legal battles. Still, instances which may give rise to libel allegations are inherent in any communication network, including the military.

One such instance occurred in Texas in 1985 when Paul Bosco brought suit against the U.S. Army Corps of Engineers

for, among other things, libel and slander (See Appendix A).[94]

Bosco was a construction contractor. He submitted a bid to the Army Corps of Engineers to be considered for a project contract in Mountain Creek, Texas. His bid was unsuccessful and the contract was awarded to Bosco's competitor. Bosco brought a libel suit against the Army Corps of Engineers asserting the government announcement of the Army's contract decision to the media ruined his reputation.

The U.S. District Court found for the Army, noting libel and slander suits against the government are barred under the Federal Tort Claims Act.

If Bosco had brought a libel suit today, naming an individual employee, such as a PAO, rather than the Army as defendant, he possibly could use the Westfall decision to his benefit. He would have to show the employee who made the alleged libelous announcement was violating established guidelines and regulations, no discretionary act was involved, and the employee enjoyed no shield to legal action. Bosco's case would be weak, but the Westfall decision does seem to provide a greater opportunity for suit.

A government employee acting within the scope of duties and following existing procedures has little to fear from a libel allegation. As the Bosco case shows, however, even innocent-sounding remarks can result in suit, dragging the organization into court and distracting from the mission.

Privacy

The second area of tort law often associated with the

communicator is invasion of privacy. This tort may well be more dangerous for the Army communicator than defamation. For example, had Bosco shown the Army announcement was not libelous, but rather placed him in a false light before the public, the resulting privacy case may have been actionable.

Privacy is a new and emerging area of law and violations are often difficult to recognize. Some states are still in the process of deciding what their privacy laws will be. Additionally, the Federal Tort Claims Act offers no exception for invasion of privacy allegations. This means, unlike libel, both the individual and the organization may be liable.

Privacy, in this section, refers to "one's right to be left alone."[95] This material will not focus on "privacy" in terms of the Privacy Act, Freedom of Information Act and release of information. Those topics are covered in various regulations and in the Army's Public Affairs Handbook.

The Tort of Invasion of Privacy

There are four generally accepted categories of the tort of invasion of privacy.

One category is "false light." False light privacy cases are those in which the plaintiff is identified as the subject of a nondefamatory falsehood that places him in a false light before the public.[96] There is no requirement for the publication to be harmful to reputation. In fact, it could be just the opposite, and actually portray the plaintiff to be better than in real life.[97] It is the context of the publication in relation to the plaintiff that makes the

publication offensive. To be liable, the publication must be highly offensive to a reasonable person and printed with actual malice (defined above in libel).

False light privacy is further divided into three subcategories: embellishment; distortion; and fictionalization.[98]

Embellishment cases often find the words about the plaintiff embellished or exaggerated. An example is the 1967 case of Time v. Hill (See Appendix A) in which the Hill family's experience as hostages was embellished to the point where family members were referred to as heroes. There is nothing defamatory about being a hero, it is simply false.

Distortion normally involves photos, films and tapes that have been altered, or are not accurate depictions. An example is the case of Jumez v. ABC Records in which the photo on the record jacket was not that of artist Jumez.[99]

Fictionalization involves stories about actual people which are fictionalized to attempt to hide their real identity, but fail to do so. Examples can be found in cases about doctors, beauty queens, and others.

There are several defenses for an allegation of false light invasion of privacy. The strongest defense is truth of the publication. If the publication resulted from accurately reporting public records, a qualified privilege defense may exist. Clearly, if the plaintiff was involved in a matter of public interest, the actual malice standard would apply. Actual malice would be easy to show in this case because the material is knowingly false. Communicators should note, how-

ever, that there is no newsworthiness in erroneous information. That defense does not apply to false light cases.[100]

The second category of privacy invasion is "public disclosure of private embarrassing facts."[101] Generally, the communication must contain private embarrassing facts of no legitimate concern to the public. The difference between this category and the false light category is the information published can be true and yet liability can still be found. Subject matter for embarrassing facts cases may deal with sexual matters, commission of crimes, poverty, idiosyncratic qualities, and others.[102]

The primary defense for public disclosure of private embarrassing facts is newsworthiness of the story.[103] Newsworthiness, however, is a term not well established by the courts. It has different meanings for different people, making recognition of these cases difficult for the communicator.

The third category of privacy is intrusion. This consists of some form of intrusion into the solitude of another. It too is divided into subcategories consisting of: surreptitious surveillance; trespass; and consent exceeded.

Surreptitious surveillance generally consists of using technology such as cameras or video or audio tape recorders to intrude where there is a reasonable expectation of privacy. Trespass is the act of physical intrusion onto someone's property to gather information without consent. Consent exceeded is generally the overstepping of bounds by the defendant. The plaintiff may have consented to give up some degree

of privacy, for example by being in a public place, but the defendant's actions exceeded that consent.

Defenses for intrusion allegations normally involve some form of consent by the subject, or that the plaintiff had no reasonable expectation of privacy in the situation. Neither truth nor newsworthiness of the story stands as a defense to invading the solitude of another.

The final category of invasion of privacy is misappropriation. One subcategory is the unauthorized use of someone's persons (photo, likeness, voice, etc.) without their permission. Another subcategory is interfering with someone else's right to market their own persona. Cases in this subcategory may arise when photographs or recordings of famous persons are used, thereby interfering with the market value of the item. Misappropriation cases are confusing, difficult to recognize and often overlap with copyright claims.

Consent, usually in the form of a written release, is the best defense to a claim of misappropriation.

Privacy Implications for the PAO

The FTCA does not exempt invasion of privacy, therefore, both the government and the individual may be liable. The tort is evolving rapidly and is so new that actual court cases are scarce. The following hypothetical scenarios are offered as examples of situations which could affect the PAO.

False Light Invasion of Privacy

The reasons someone would bring a false light invasion

of privacy case are often difficult to understand. Recall the Time v. Hill case involving a family referred to as "heroes." To many, a "hero" label would seem complimentary and certainly no reason to go to court. To the Hill family, the label caused suffering.

A similar situation could easily occur in on-post quarters. A military family is taken hostage. Army investigators defuse the situation and arrest the hostage taker. The family shuns publicity. They were not heroic and simply tried to survive the ordeal, but were called heroic in a subsequent post newspaper article and in reports to local media. The unwanted publicity caused the family distress. Further, the term "hero" is a sensitive label in the military and one the family did not appreciate. A false light privacy suit results.

Even if the family is unsuccessful in court, the Army communicator has brought adverse publicity to the organization.

Intrusion

Investigating the above story, a reporter for the post paper records a telephonic interview. The reporter only uses the recorder to insure the accuracy of the subsequent article. The reporter does not, however, obtain the permission of all parties of the recorded conversation. The person being interviewed claims the recording was an intrusion. A privacy suit results.

Public Disclosure of Private Embarrassing Facts

Public disclosure cases are troublesome because a common misperception is that if published information is true, no harm has been done. These cases, by definition however, involve factual stories.

This situation involves loss of money from a post facility. The money is found by a civilian post employee who promptly turns the money over to proper authorities. For his actions, the employee is rewarded with a check for $500.

The post paper sends a reporter to the employee's home to do an interview and take some photographs. The reporter is shocked to discover the employee's depressed living conditions. An article appears in the post paper about the employee. A caption under one photo suggests the money might help the employee afford a higher standard of living.

The employee has made no attempt to publicize his standard of living, is embarrassed by this sensitive personal matter, and brings suit.

Misappropriation

The local military installation is sponsoring an annual family appreciation night on post. A well-known rock band is the main attraction. In an attempt to advertise the activity, the PAO and morale support office print and distribute t-shirts and posters showing a likeness of the band. The band never gave permission for the shirts or posters. Further, they planned to sell posters at the concert. The band sues, alleging their ability to market themselves has been damaged.

Infliction of Emotional Distress

This is an even newer area of tort law than privacy. It has "become [an] increasingly popular cause of action against the media in recent years."[104] As in privacy, the concern is damage to the plaintiff's state of mind, rather than damage to reputation.

To bring a successful suit, the plaintiff must show the conduct of the defendant was intentional or reckless, was extreme, and caused severe emotional distress.[105]

This tort is, like privacy, not excluded under the Federal Tort Claims Act. The government and the individual may, therefore, be liable. Military communicators who deal with sensitive information need to be cautious.

A possible scenario involves the wreck of a military vehicle loaded with soldiers. Military officials rely on available rosters to determine casualties and notify next of kin. One wife is erroneously notified her husband was in the vehicle and is a casualty.

The wife's emotional well-being has been damaged and she has suffered severe distress. The conduct may or may not have been reckless, but the publicity given to the grieving wife will certainly be damaging in the public eye.

It is difficult to determine how courts will apply this logic to the military, but they seem to be realizing that injury to mental well-being is worthy of compensation.

Summary

Personal and organizational liability is often diffi-

cult to determine. In summary, the following analysis is offered.

Regardless of the complaint, if the plaintiff is a military member the Feres Doctrine will shield the military communicator.

If the plaintiff is civilian, the type of common law tort needs to be considered. Libel suits are excluded under the Federal Tort Claims Act. The only possible remedy, and it is weak, is suit against the individual. Barr and Westfall combine to offer immunity to those officials acting with discretion in the scope of duty.

Privacy and infliction of emotional distress are not exclusions to the FTCA. Suit may be brought against the government and the individual. Protection of the individual is parallel to that offered in other damage suits.

CHAPTER NOTES

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CHAPTER V

COPYRIGHT INFRINGEMENT

The areas of copyright, copyright violation and other such "property rights" subject are separate and distinct from torts discussed in Chapter IV.

Army communicators, although personally shielded from legal action, can involve the organization in a copyright dispute.[106] Mistakes of this nature are sure to be, at least, professionally embarrassing.

Copyright and the use of copyrighted material is covered in statutory and regulatory publications, including Title 28 of the U.S. Code. For Army personnel, the Army Patent, Copyright, and Trade Division[107] and Army Regulations 310-1, 360-5, and others add additional guidance.

Despite readily available guidance, however, copyright is far from a clear-cut, easily understood branch of law. Books have been written in an attempt to interpret and clarify single paragraphs in existing regulations.[108]

Copyright is a property interest covered in Article 1, Section 3(8) of the United States Constitution. "The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings

and Discoveries."[109] By protecting the author and the creation of the author, the free and uninhibited flow of information is promoted.[110]

Copyright laws date to 1790.[111] The most recent law became effective in 1978. In general, the current law includes the following:[112]

1) Copyright can be obtained by submitting a request and a copy of the material to be copyrighted to the Copyright Office in Washington, DC.

2) While a copyright technically exists from the moment of creation, and the creator can simply affix the copyright symbol to his work without registering it with the Copyright Office, only through formal registration can copyright infringement suits seeking statutory damages and attorney fees be sought.

3) A copyright is effective for the life of the author plus 50 years. Joint authored works are protected for 50 years from the death of the longest surviving author.

4) Use of the copyrighted material without permission of the copyright holder constitutes wrongful use of his property. There are, however, exemptions to the owner's exclusive rights. Among them are copyrighted materials which are reproduced for "fair use." "The fair use exemption allows use, without the owner's permission, of a portion of a copyrighted work for purposes of criticism, comment, news reporting, teaching, scholarship, or research."[113] When using copyrighted material under the fair use exception, several

factors need to be considered. The use must be for nonprofit purposes. Additionally, the nature of the use must be very limited, and the amount used very small. Finally, the effect of the use on the potential market for the copyrighted work must be judged. There is little specific guidance for these fair use considerations.

Two areas of copyright law that may have a direct impact on the Army communicator are 1) violation of another's copyright; and 2) obtaining copyright for one's own creation. The infringement allegation is more serious from a legal and public relations view, and is addressed first.

PAO's have a vast network of communication outlets at their disposal. It is certainly possible for a copyright infringement to occur. Army Regulations and Title 28 of the U.S. Code provide a shield for public affairs officers against any copyright suit brought against them in their official capacity.

Specifically, Title 28 provides ". . . whenever the copyright in any work protected under the copyright laws of the United States shall be infringed by the United States, . . . or any person . . . acting for the Government and with the authority or consent of the Government, the exclusive remedy of the owner of such copyright shall be by action against the United States. . . ."[114]

Army Regulation 310-1 adds, "Government employees would not be personally liable for infringement in the course of their official duties."[115]

While government employees are personally exempt from suit, their actions have invoked existing statutes and involved the government in copyright disputes.[116]

These statutes, however, are "remarkably underutilized."[117] Therefore, the following scenario is offered to illustrate how a PAO may become involved in a copyright infringement.

Army Times, a copyrighted publication, routinely obtains data regarding military pay scales. They present that data in a format and manner unique to the publication. The PAO, facing a printing deadline, wishes to inform the readership of the new pay scale as soon as possible. The PAO decides to use the Army Times chart and fails to obtain their permission.

This good-faith effort of the PAO is a copyright violation. The remedy for Army Times is action against the government.

Communicators should understand that although the data is in the public domain (and may even be government information) and not copyrightable, the expression of that data, however, is copyrightable.

A second situation, and one often overlooked by communicators, involves the area of "publicity" rights. This area overlaps with misappropriation privacy cases discussed in Chapter IV.

Suppose the PAO wishes to print a copyrighted photograph of an actor. Permission should be obtained, as discussed above, from the copyright holder. Additionally, the user of the photograph must be sure that the actor depicted

in the photo has no independent rights of publicity. If there is independent publicity rights, permission to use the photo should be obtained from the actor as well as the photographer.

Aside from the possibility of infringing someone else's copyright, another reason to be aware of copyright guidance is for Army communicators who may wish to obtain copyrights for their own creations.

This situation is addressed in the current copyright statutes under "made-for-hire" provisions. In general, employers own the work of their employees unless there is a written agreement to the contrary. This is true in corporate America as well as in the military. Works prepared by an employee of the government (e.g. the Army PAO) as part of that person's official duties, cannot be protected by copyright. Such works, provided they are unclassified, are considered to be in the public domain.

As is the case in other areas of law, this language has been tested in the courts. In 1967, Navy Admiral Hyman Rickover was successful in convincing a district court that he, and not the Navy, was entitled to copyright protection of speeches he had given discussing public education (See Appendix A). The court held the admiral had not "mortgaged all the products of his brain to his employer."[118]

As the Rickover case indicates, creations prepared by Government employees which are outside the scope of their duties can be copyrighted. Determining if something was

created outside the scope of duties is difficult, particularly for the PAO whose duty it is to communicate.

Consider the scenario involving a PAO sent on official orders to a civilian journalism course. Funding is provided by the government. One course requirement is completion of an article for publication. In this situation, a balancing test would be used to determine if the creation was outside the scope of duty and copyrightable. Here, the government is funding the work, the officer is on official orders, the officer's duty is to communicate, and the creation is part of course requirements. The creation, although technically not created "at the office," is probably not copyrightable.[119]

If a military member owns a copyright, and that copyright is violated by the government, the soldier can bring suit against the government provided he in no way ordered government use of the copyrighted material.[120] This illustrates the difference between common law tort violations and copyright violations. (Recall the Feres Doctrine barred suits by military against the government for common law torts.)

CHAPTER NOTES

[106]Title 28, U.S.C. Section 1498(b).

[107]Interview with William Adams, Lieutenant Colonel, U.S. Army Patent, Copyright and Trade Division, Washington, DC, 27 January 1988.

[108]Ibid.

[109]Gillmor, p. 676.

[110]Ibid.

[111]Ibid.

[112]Ibid., p. 677.

[113]Army Regulation 310-1, p. 2-8.

[114]Title 28, U.S.C. Section 1498(b).

[115]Army Regulation 310-1, p. 2-9.

[116]Shipkovitz v. United States, 1 Cl. Ct. 400 (1983), as cited in William F. Patry, Latman's The Copyright Law, 6 ed. (Washington, DC: The Bureau of National Affairs, Inc., 1986), p. 271.

[117]Patry, p. 271.

[118]Gillmor, p. 678.

[119]Adams. Telephonic interview conducted 16 March 1988.

[120]Title 28, U.S.C. Section 1498(b).

CHAPTER VI

OTHER LEGAL ISSUES

Previous chapters focused on communication law principles and liabilities. The Defense Information School's PA Handbook implies there are a number of other legal areas in which the public affairs officer must be familiar. This chapter provides a brief discussion of two of these areas.

Commercial Enterprise Newspapers

There are two types of Army newspapers -- Authorized Army and Commercial Enterprise.[121] Authorized Army newspapers are published by Army components using appropriated funds or by a commercial publisher in accordance with Army printing regulations. There are 325 such papers, many published by Army Reserve and National Guard units. No advertising appears in Authorized Army papers.[122] Commercial Enterprise newspapers are published by commercial publishers under contract with the Army.[123] These publishers sell advertisements in the papers, keep the revenue, and provide the Army with a professionally printed publication free of charge. There are 57 Commercial Enterprise newspapers, including the Fort Jackson Leader, Fort Bragg Paraglide and Fort Gordon Signal.[124] Army Regulation 360-81 outlines specific guidance for establishing and maintaining Commercial Enter-

prise and Authorized Army newspapers.

While there seem to be few problems with Authorized Army papers, establishing a Commercial Enterprise newspaper is not always without dispute, and PAO's may become involved.[125] The 1986 case of MNC of Hinesville v. U.S. Department of Defense (See Appendix A) brought into question the Army's section of a single commercial enterprise to distribute a newspaper on an installation. MNC, publisher of a newspaper in Hinesville, GA, filed suit against the Department of Defense challenging the Army's decision to award its Fort Stewart commercial enterprise contract to a competitor. The suit alleged the Army afforded the competitor preferential treatment by granting it sole access to on-post distribution points. This, said MNC, was in violation of its First Amendment rights.

The federal district court granted the Army's motion for summary judgement. On appeal to the 11th Circuit, that judgement was affirmed. The circuit court agreed that the Army's actions of selecting a commercial enterprise publisher and affording it sole access to distribution points did affect activity "within the scope of the First Amendment," but the access points on post did not constitute a public forum. Limiting general access to those points was a reasonable restriction on speech, and did not infringe MNC's constitutional rights.

Communicators should remember different circuits can, and often do, render contradicting decisions, and the 11th

Circuit's position may not be followed by other circuits.

Foreign Claims Act

The issue of Commercial Enterprise papers presents a straightforward problem with case precedent to rely on. Problems involving the communicator and the Foreign Claims Act are not as settled.

Legal issues confront PAO's overseas and at home. Public affairs officers overseas, however, may face added problems when foreign citizens perceive they have been harmed. Laws of other countries may not resemble our own. Actions may be harmful in other countries and perfectly acceptable in the United States. Countries may have different names for harmful actions. The key to avoiding problems is a complete understanding of local laws and traditions of the host country and surroudning area, coupled with an awareness of international agreements and the Foreign Claims Act.

The Foreign Claims Act allows foreign national citizens to be compensated for damages caused by U.S. soldiers in their country. The Act was passed, "To promote and maintain relations through the prompt settlement of meritorious claims."[126]

The Act authorizes "the administrative settlement of claims of inhabitants of a foreign country, or by the country, against the United States for personal injury . . . caused outside the U.S. . . . by military personnel. . . ."[127]

"Liability of the United States under the Foreign Claims Act is determined, so far as possible, by pertinent legal

principles forming the law of the place where the claim arises."[128]

Of particular interest to communicators is that claims arising from libel and slander are not allowed under the Foreign Claims Act.[129] (This exclusion also applies to libel and slander suits brought by U.S. citizens under the Federal Tort Claims Act.) The inability to bring a "meritorious claim," however, may not mean the Army will not suffer in the court of public opinion should the injury become public.

Other communication-related torts, however, such as invasion of privacy and infliction of emotional distress, are not excluded under the Foreign Claims Act. Liability for these torts depends on several factors. Does the country where the claim arose have a custom, tradition, or law which establishes such rights? If it does, that country's legal principles are used. If not, do neighboring countries have such rights? Another consideration is any additional agreements the country has with the United States which specify different claims procedures.

CHAPTER NOTES

[121]Army Regulation 360-81, p. 7.

[122]Lundberg, Interview of 26 January 1988.

[123]Army Regulation 360-81, p. 7.

[124]Lundberg interview.

[125]MNC of Hinesville v. U.S. Department of Defense, U.S. 11th Circuit, June 23, 1986.

[126]"Claims," Department of the Army Pamphlet 27-162 (Washington, DC: Department of the Army, 1984), p. 4-1.

[127]Title 10 U.S.C. Section 2734, "Foreign Claims Act."

[128]DA Pamphlet 27-162, p. 4-7.

[129]"Claims," Army Regulation 27-10 (Washington, DC: Department of the Army, 1987), p. 39.

CHAPTER VII

CONCLUSIONS AND IMPLICATIONS

The programmed text following the law chapter in a recent edition of the Public Affairs Handbook states "as a Public Affairs Officer, your service, you, and [the Department of Defense] are subject to the laws of communication as are private citizens and commercial media."[130]

Another section of the handbook adds, "The range and complexity of law in the United States is approaching awesome proportions. . . . The command's involvement with legal situations is becoming all too clear."[131]

Finally, the handbook notes, "The PAO must maintain a close working relationship with legal personnel."[132]

Communication law is a complex subject. Changing the venue to a military community only complicates the issue because of such concepts as "official immunity," "public official," "public forum," "scope of duties," "military necessity," and "exercising discretion."

The public affairs officer serves as the commander's mass communication expert. Part of that responsibility should include an awareness of legal issues and court decisions regarding communication law.

Military Personnel and Freedom of Speech

Since 1798, despite the First Amendment, the government has attempted to regulate all types of speech. Courts have often held that such attempts are Constitutional.

Clearly, the military branch of government constitutionally may regulate the speech of its members. Courts, citing national security and the "separate society" theory, have given great deference to military regulation of speech.

The role of the public affairs officer in this issue may be best described as one of informed counselor. Commanders and others should be able to turn to the mass communication expert for answers to questions about speech, restricted speech, and prohibited speech. The media may inquire about why military members, who sometimes make the ultimate sacrifice to protect the Constitution, do not enjoy its full range of freedoms. The knowledgeable PAO can provide answers to these and other sensitive First Amendment questions.

Access to Information, Operations and Installations

Guidance for the PAO when dealing with press access to government information is contained in the Freedom of Information Act. The military's commitment to this Act is stated in a Secretary of Defense memorandum. Regulatory guidance is also available.

Guidance for the PAO when dealing with press access to operations, however, is more limited and the legal position of the Army and the PAO is not as clear. Beginning with Richmond Newspaper, and extending through Press Enterprise II,

there seems to be a growing tendency to allow press access to operations of government, particularly if the two-prong Richmond test is met. The two prongs are 1) is the operation traditionally open to the press, and 2) does the press contribute to the integrity and quality of what takes place.

Historical openness of battlefields and media contributions to public understanding may lead courts to determine that press bans from Grenada-like operations are a violation of constitutional rights. World events increase the likelihood of similar operations in the future. The PAO's role in this controversy should be one of mediator, explaining the Army's position to the press and the concept of press access to the command. Shared understanding may preclude the type of military-media fallout seen following Grenada.

While there is some case precedent and military commission findings to guide the PAO in situations involving press access to operations, the issue of access to installations is less settled.

Military attorneys have called this "a no-win [situation]."[133] From Flower to Greer, from SAC to Albertini, the best advice seems to be: do not invite or allow any political activities on base unless all positions are allowed to participate; and during an open house make it clear that the commander is not relinquishing total control over the base.[134]

Many PAO's will become involved with "open house" days held on their installations. These are opportunities to display the state of military readiness and offer a gesture

of goodwill from the military to its civilian neighbors. The issue of access, if not well thought out, could easily surprise the command and turn this valuable community relations event into a time consuming and expensive court case. PAO's should provide counsel concerning physical location of the event (based on Flower), participants, activities, and other operational aspects.

Whether a court case actually results from a civilian who perceives his rights were violated or from a reporter who is denied access to an operation, the publicity from the alleged harm will be damaging to the military's effort to "tell the Army's story."[135] This damage to the Army in the court of public opinion may be avoided through prior knowledge and awareness.

Liability for Torts

Two critical considerations exist for the military to determine organizational and personal liability for common law torts: status of the plaintiff and type of alleged tort.

If the plaintiff is a military member, the Feres Doctrine bars suit against the organization and the individual communicator regardless of the type of tort alleged. While Feres seems to be an effective shield, it is under constant attack. Feres apparently is based on 40-year-old logic that the military is a society totally separate and distinct from the civilian world, and can only operate under strict and blind discipline. This logic may not stand the test of future legal challenges.

The military is indeed different from the civilian environment. But the vast differences seen by the 1950 Supreme Court which created the Feres Doctrine may no longer be present. Further, the need for strict and blind discipline is also suspect to some degree in the Army of 1988. There is, certainly, a need for discipline. Many leaders would argue, however, that the iron-clad discipline of World War II has given way to a "team" approach to mission accomplishment.

The PAO would be well advised to remain aware of current decisions involving the Feres Doctrine.

If the plaintiff is a civilian, however, the type of tort needs to be considered to determine liability. For libel, the plaintiff's only possible suit is against the individual communicator because libel suits against the government are barred under the FTCA. The possibility of successful suits against individual communicators acting with discretion in the scope of duty seems remote. The Westfall decision, however, may encourage plaintiffs to attempt legal action. Westfall also seems to place junior military personnel at more of a risk than their superiors. One key in Westfall was the exercise of discretion. The lower the rank, the less discretion is exercised. For the PAO who supervises a subordinate staff, fallout from Westfall deserves special attention.

If the author had to establish a priority list of legal issues for the PAO to track, at the top would be invasion of

privacy and infliction of emotional distress. These are rapidly growing and volatile areas of tort law. The right to be let alone is critical in today's society where sensitive and personal information is at the fingertips of anyone with a computer and modum. Additionally, the FTCA does not exclude these torts. If invasion of privacy or infliction of emotional distress are alleged, both the government and the individual may be liable. The possibility of winning money damages may be remote, but the courts and the public might not be sympathetic to a "military establishment" that disregards someone's privacy.

Copyright Infringement

Individual Army communicators, acting in the scope of duty, are not liable for infringements of copyright under Title 28 U.S.C. Section 1498(b). Army communicators may, however, cause a copyright suit to be brought against the government. This organizational liability, and the personal and professional damage that may result, is where the dangers lie.

There is a wide variety of copyrightable creations, and copyright holders are often very protective of their works. Many make a living from their expression of ideas and are not sympathetic to those who infringe upon their livelihood. Additionally, other violations, such as publicity infringement, may be hidden in what appears to be only a copyright problem.

The best advice for the PAO to follow when using copy-

righted creations, unless the use is a very minor "fair use" exception, is to obtain permission or use alternative materials.

Other Legal Issues

This thesis emphasizes four legal issues that concern military communicators. The range of legal issues that could confront the communicator, however, is much broader.

For example, at least one recent court decision seems to indicate the Army constitutionally can establish a single Commercial Enterprise paper on a military installation, and limit the post distribution points to that paper. The PAO should realize, however, that circuit court decisions such as MNC of Hinesville can vary with jurisdiction and venue. There is no guarantee that similar confrontations will result in similar decisions.

The final issue, and one that seems the most unsettled, is a practical one that may confront PAO's in overseas locations. As the Army increases communication in an effort to tell its story to foreign audiences, communicators need to become familiar with statutes and foreign laws addressing liability for damages that may result from that communication.

The Foreign Claims Act allows foreign nationals to be compensated for damages caused by soldiers. The Act does not recognize libel claims, but may recognize claims like invasion of privacy and other communication-related torts. PAO's need to beware that claims under the Act are settled using the legal principles of the country where the harm occurred.

Laws of those countries may not resemble our own, and may include wrongs not recognized in the United States. The PAO should try to gain a complete understanding of host nation and neighboring country laws and traditions.

Final Note

The adverse publicity resulting from misuse or abuse of the communication network, even if defenses are available and the individual communicator is not held personally responsible, can be devastating to an Army striving to present the best possible public picture of itself.

The shields available to military communicators provide some protection from personal and organizational liability, but there are no such shields to protect from adverse reactions in the public sector. Absent such shields, knowledge of issues and inherent dangers may be the best alternative.

An ageless military axiom says an effective Army must be able to "move, shoot, and communicate." The author hopes this thesis will contribute to the successful accomplishment of the communication third of this triad.

CHAPTER NOTES

[130]Perry C. Bishop, et al, "The Public Affairs Officer and the Law," PA Handbook (Ft. Benjamin Harrison: Defense Information School), p. 24-III-2.

[131]Ibid. Updated version, p. 15-16.

[132]Ibid.

[133]Rosenow, p. 274.

[134]Ibid.

[135]Army Regulation 360-5, p. 3.

APPENDIX A

CASE FACT PATTERNS

CHAPTER 2.

Schenck v. United States - 39 SCt 247 (1919)

Mr. Schenck was the secretary of the communist party in America. He was prosecuted under the Espionage Act for publishing a leaflet interfering with recruiting by urging young men who had been drafted to violate the draft laws. Schenck's conviction was upheld on appeal to the Supreme Court in 1919 which ruled that such words presented a "clear and present danger" of bringing about the "evils that Congress has a right to prevent."

Whitney v. California - 47 SCt 641 (1927)

Mrs. Whitney helped organize the Communist Labor Party in California in the 1920's. She was arrested and convicted under state Criminal Syndicalism Act for advocating commission of crimes as a means of political change. The Supreme Court upheld her conviction, and in so doing revised the "clear and danger" doctrine. After Whitney, the test for suppresion of speech became "reasonable ground to fear imminent danger of a serious evil."

Dennis v. United States - 71 SCt 857 (1951)

Mr. Dennis was convicted in 1949 of violating the conspiracy provisions of the Smith Act. That Act made it a crime to advocate the overthrow of the U.S. government by force or violence, or to join any group which advocated such an overthrow. His conviction was upheld by the Court in 1951. The Court again redefined the notion of "clear and present danger." After Dennis, the test for suppression of speech became a question of "whether the gravity of the evil, discounted by its improbability, justifies such invasion of free speech . . ."

Brandenburg v. Ohio - 89 SCt 1827 (1969)

Brandenburg was a leader of a Ku Klux Klan group. He was convicted under the Ohio Criminal Syndicalism statute barring the advocation of violence as a means of political reform, or belonging to groups which advocated such violence. In a 1969 decision, the Court held the Ohio statute unconstitutional and reversed Brandenburg's conviction. The Court returned to language that differentiated between advocacy and incitement to "imminent lawless action." In a sense, the decision struck down the language of Dennis and Whitney which allowed suppression of speech based on advocacy alone, and returned to a strict version of "clear and present danger."

Near v. Minnesota - 51 SCt 625 (1931)

Mr. Near published the Saturday Press, a scandal sheet which appeared each week in Minnesota. A Minnesota statute prohibited the publication of "malicious, scandalous, and defamatory newspapers." Near was arrested, convicted, and forbidden from ever publishing the paper again. The Supreme Court, in 1931, reversed the conviction calling it a case of prior restraint by the government.

New York Times v. United States - 91 SCt 2140 (1971)

This 1971 "Pentagon Papers" case resulted from the publishing of a Department of Defense study of the history of U.S. involvement in Vietnam. The documents were stolen by Daniel Ellsburg and provided to the New York Times. The Times spent three months reviewing the documents, then began to publish them in a series in the paper. The government asked for and received a temporary restraining order in order to read the papers and prepare their case. After the Circuit Court renewed the order, the Times sued the U.S. government alleging First Amendment violations of prior restraint of political speech. The Supreme Court handed down a decision in which all nine justices wrote separate opinions. The holding was the government had a heavy burden of justifying such a restraint and, in this case, did not meet that burden.

United States v. Howe - 17 USMCA 165 (1967)

1967 case of Army First Lieutenant Howe who was arrested and convicted under Article 88 of the Uniform Code of Military Justice for participating in an anti-war rally while he was off-post, on leave, and in civilian clothes.

Parker v. Levy - 417 US 733 (1974)

Captain Levy made statements urging that black soldiers not go to Vietnam. He was convicted under Article 88 of the UCMJ. In 1974, the Supreme Court upheld the conviction.

Brown v. Glines - 444 US 348 (1980)

Air Force Reserve Captain Albert Glines drafted a petition objecting to Air Force grooming standards. The petition found itself in the hands of an Air Force NCO who circulated it on the Travis Air Force Base installation without permission of the commander. Glines was subsequently removed from active duty. He sued, claiming violation of free speech. His case prevailed at district and circuit levels, but was overturned in 1980 by the Supreme Court which cited the "military is, by necessity, a specialized society separate from civilian society."

CHAPTER 3.

Houchins v. KQED - 438 US 1 (1978)

Case dealt with the assertion that station KQED had a right of access to a prison. In a 1977 ruling, the Court held that the press has no such right to prisons or prisoners beyond that of the general public.

Nebraska Press Association v. Stuart - 96 SCt 2791 (1976)

This case revolves around a sensational murder in a small Nebraska town. Due to the possibility of pretrial publicity, the judge issued a restraining order to the press limiting what could be reported. The limitations were directly from an agreement between the Nebraska Press Association and the state bar. The NPA brought suit against the judge contesting the restraint. The Supreme Court struck down the restraint, but created a three prong test for a successful order. 1) Evidence of prejudicial coverage. 2) All other measures discounted. 3) Evidence that the restraint will work.

Gannett v. DePasquale - 443 US 368 (1979)

Case arose after an ill-fated fishing trip in which one of the three partners was killed. His two companions were arrested and charged with the crime. During the pretrial hearing, Judge DePasquale closed the courtroom based on pretrial publicity and over no objection from prosecution or the Gannett reporter present. The judge's action was upheld on appeal, and affirmed by the Supreme Court in 1979.

Richmond Newspaper, Inc. v. Virgnia - 100 SCt 2814 (1980)

This 1980 decision followed a bizarre string of occurrences resulting from the 1976 murder case of Mr. Stevenson in Virginia. Stevenson was tried no less than four times. Finally, during the fourth trial, the judge closed the courtroom on a motion from the defense. There was no objection from the Richmond Newspaper reporters present or from the prosecution The Supreme Court found for the newspaper, holding there is a right of press access to courtroom situations.

Press Enterprise v. Superior Court - 464 US 501

Prior to the voir dire process at a California trial for the rape and murder of a teenage girl, petitioner moved that voir dire be open to the public. The State opposed, arguing that presence of reporters would create a lack of candor in juror responses. The Court held the guarantees of open public proceedings in criminal trials extend to the voir dire process.

Greer v. Spock - 424 US 828 (1976)

Dr. Benjamin Spock, People's Party candidate for president in the 1972 election, asked the commander of the Fort Dix, NJ, army reservation for permission to distribute literature and conduct a political rally on the post. The commander denied the request based on local regulations against political activity on the post. Spock disregarded the denial, entered the post, passed out literature, was evicted and

barred from re-entry. Spock sought and was granted relief from the Third Circuit, and subsequently appeared for a one-day rally on the post. The Supreme Court reviewed and overturned the decision in 1976.

Cafeteria and Restaurant Workers v. McElroy - 367 US 886

A cook at a restricted naval gun factory was dismissed from her job for failing to meet security requirements. Consequently, in 1961, the Supreme Court held that a military installation commander can exclude civilians from the area of his command.

Flower v. United States - 407 US 197 (1972)

Defendant Flower, having been previously barred, entered the Fort Sam Houston, TX, army post and handed out leaflets on an avenue running through the installation. The avenue was a major thoroughfare for the post and the adjacent city of San Antonio. Flower was arrested and convicted of trespass. The Supreme Court, in 1972, reversed the conviction. It held the military had abandoned any claim to special interest in who walks, talks, or distributes literature on the avenue. In essence, the place was open to the public.

Persons for Free Speech at SAC v. United States Air Force - 675 F2nd 1010 (1982)

An organization called "Persons for Free Speech at SAC" asked for permission to set up a booth during open house activities at Offutt Air Force Base, Nebraska, in 1981. Their request was denied by the base commander. PFS sued

for injunctive relief and the denial was upheld at the district level. The Eighth Circuit upheld, concluding that the commander may limit access to those groups whose subject matter is consistent with the purpose of an open house.

United States v. Albertini - 105 SCt 2897 (1985)

James Albertini, barred from Hickham Air Force Base, Hawaii, entered the base during a 1981 open house and passed out literature to protest the arms race. He was arrested and convicted of Federal Trespass statutes. His conviction was overturned on appeal to the Ninth Circuit which held that Hickham was turned into an open forum during the open house. The Supreme Court overturned the Ninth Circuit in 1985, holding there was no public forum created even in an open house situation.

CHAPTER 4.

New York Times v. Sullivan - 84 SCt 710 (1964)

In March, 1960, the New York Times ran a full-page ad called "Heed Their Rising Voices." The ad was placed by numerous prominent Americans, including several Southern clergymen. In the text of the ad, "southern violators" were referred to, and "they" were accused of making unlawful arrests and otherwise intimidating Dr. Martin Luther King. L. B. Sullivan, Montgomery, Alabama, police commissioner, alleged the ad was referring to him and his department and demanded a retraction. The Times refused, and a landmark

libel case resulted. The Circuit Court awarded Sullivan $500,000.00, and the State Supreme Court affirmed. In 1964, the Supreme Court reversed, establishing the actual malice standard for public officials in defamation suits.

Rosenblatt v. Baer - 383 US 75 (1966)

Baer was hired by the county commission in Belknap County, New Hampshire, to serve as supervisor of its public relation facility. After Baer's dismissal, Rosenblatt's weekly newspaper printed a column alleging Baer's inefficiency and dishonesty. Baer sued for defamation. In a 1966 decision, the Supreme Court held Baer a public official, and used this case to define "public official." They are those who have or appear to have significant decision-making authority.

Curtis Publishing Co. v. Butts and AP v. Walker - 87 SCt 1975 (1967)

Earl Butts was the athletic director at the University of Georgia. Curtis Publishing ran an article accusing him of disclosing his game plan to an opposing coach before a game. Walker was a retired U.S. Army General. AP accused him of personally leading students in an attack on Federal marshals who were enforcing a desegregation order at the University of Mississippi. In both cases, the lower courts had held the men not to be public officials, and awarded them damages. In 1967, the Supreme Court used the cases to establish the "public figure" category of defamation plaintiff and extend the actual malice standard to them. The Court affirmed Butts, reversed Walker.

Rosenbloom v. Metromedia - 91 SCt 1811 (1971)

Rosenbloom was a magazine distributor. He was arrested in a police raid and charged with distribution of obscene material. Metromedia radio referred to him in a news report as a "girlie-book peddler" and "smut distributor" although he was later acquitted of obscenity charges. Rosenbloom sued. The Supreme Court used this 1971 decision to back away from "public official/public figure" categories of those who must show actual malice. Instead, the Court ruled that if the issue involved is public, the plaintiff must show actual malice regardless of his public or private status.

Gertz v. Robert Welch, Inc. - 94 SCt 2997 (1974)

Gertz, an attorney, was retained by the family of a black youth who was shot and killed by a Chicago policeman. Welch was the publisher of a John Birch Society magazine. The magazine, American Opinion, ran an article on the Chicago shooting and alleged that Gertz was part of the plot to convict the policeman, had a criminal record, and was a Marxist. Gertz sued. The district judge first ruled Gertz not to be a public figure/official and, therefore, not subject to the actual malice standard. Later, the judge changed his ruling and, because this was a matter of public concern, the actual malice standard should apply. The court of appeals confirmed. Gertz appealed to the Supreme Court. Their 1974 decision is discussed at length in the text of this thesis.

Feres v. United States - 340 US 135

Consolidation of three cases in a 1950 Court decision. In one case, a soldier was burned to death in a barracks fire in New York. In another case, a soldier who had been operated on while in the Army, later discovered an Army medical towel had been left in his body at the time of the operation. Finally, another soldier alleged military medical malpractice. The estates of the soldiers brought suit against the military. All three suits were dismissed at the district level. On appeal, two of the three district dismissals were affirmed. On further appeal, the Supreme Court held that the government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries are the result of service.

Barr v. Matteo - 360 US 564 (1959)

Barr was the General Manager of the Federal Office of Rent Stabilization. Matteo was one of his employees. The case arose from disciplinary action and subsequent press release issued by the office in 1953 which Matteo alleged libeled him. The Supreme Court, in 1959, held that federal officials are immune from common law suit (such as this libel case) when acting with discretion in the scope of their duties.

Westfall v. Erwin - US SCt (1988)

William Erwin was an employee at a warehouse on Anniston Army Depot, AL. He sued Westfall, his supervisor, on the grounds that Westfall allowed chemicals to be improperly stored, causing Erwin to be injured. The district court dis-

missed the case citing the Barr "official immunity." On appeal, the circuit court reversed. It held that although storing chemicals was in the scope of Westfall's duties, there is no discretionary function involved in the storage location decision. In January, 1988, the Supreme Court affirmed.

Howard v. Lyons - 360 US 593 (1959)

A civilian employee of the Boston Navy Yard sued the Yard commander for alleged defamatory statements contained in a memorandum forwarded to superior officers. The Court, in a 1959 decision, cited Barr. It held that writing the memo was in the scope of the commander's duty, and therefore he was immune from suit.

Bosco v. U.S. Army Corps of Engineers - 611 FSupp 449 (1985)

Bosco submitted an unsuccessful bid for a contract to work on a Corps project in Texas. He alleged military officials defamed him when they announced he had not won the bid. U.S. District Court found for the military, holding defamation was an exception to the Federal Tort Claims Act under which Bosco sued.

Time v. Hill - 87 SCt 534 (1967)

In September of 1952, the Hill family was held hostage for 19 hours by three escaped convicts. The incident occurred in the Hill home, and they were treated well by their captors. After becoming the focus of national attention, the Hills moved to another state and refused to make public appearances.

In 1953, a novel was published about the incident. In 1955, Life magazine ran a story on a play being done which, Life said, was inspired by the Hill episode. The Life story went on to call the play a "heartstopping account of how a family rose to heroism in a crisis." The Hills, claiming the story was inaccurate, sued Time, Inc. for invasion of privacy. In a 1967 decision, the Court applied the actual malice standard holding that this case was in the public interest. The Hill family, and their attorney Richard M. Nixon, lost the case.

Jumez v. ABC Records - 3 Med.L.Rptr. 2324 (SDNY 1978)

Jumez was a guitarist and recording artist for ABC Records. The album cover that ABC produced for Jumez pictured a performer playing a guitar. The performer was not Jumez. Jumez sued, claiming that the cover was a distortion, done with actual malice, and an invasion of his privacy.

CHAPTER 5.

Public Affairs Associates, Inc. v. Rickover - 268 FSupp 444 (1976)

U.S. Navy Admiral Hyman Rickover wrote, copyrighted, and delivered speeches on his own time to private organizations. Public Affairs Associates, an educational publisher, contended those speeches were in the public domain and sought to publish them. A federal district court held the speeches concerned matters removed from the Admiral's official duties, were prepared on his own time, were private property and, therefore, copyrightable.

CHAPTER 6.

MNC of Hinesville v. U.S. Department of Defense - 11th Cir June 23, 1986.

MNC published a Commercial Enterprise paper for Fort Stewart army base. They submitted, but failed to win, a bid for contract extension. MNC then sued the Department of Defense challenging the Army's decision, and alleging the Army afforded preferential treatment to competitors by not allowing MNC access to on-post distribution points after they had lost the bid. The 11th Circuit upheld the district court summary judgement for the military. The post was not, said the court, a public forum, and limiting access to distribution points was a reasonable restriction on speech.

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